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Supreme Court, U.S.
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No. 03-1424

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH al-MARRI,
Petitioner,

v.

DONALD RUMSFELD, Secretary of Defense,
and M.A. MARR, Commander, Naval Consolidated Brig,
Charleston, South Carolina,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The World Organization for Human Rights USA (Human Rights USA)[1] is a non-profit, public interest human rights organization dedicated to enforcing compliance with human rights standards in the United States. In light of its experience working on these issues, Human Rights USA has special qualifications to assist the Court in its consideration of this case in the capacity of *amicus curiae*.

Human Rights USA is a human rights group operating in the United States and incorporated in the State of Maryland as a 501(c)(3) tax exempt organization Established in 1996, Human Rights USA serves as the United States affiliate of a worldwide network of more than 200 human rights groups, each giving primary attention to human rights compliance by their own governments and in their own countries. The international network has an international secretariat located in Geneva, Switzerland, and is referred to as l'Organisation Mondiale Contre la Torture (OMCT, or World Organization Against Torture).

Human Rights USA monitors and reports on U.S. compliance under each of the major international human rights treaties, with a special focus on torture-related issues, and provides legal assistance in a limited number of cases raising the most significant legal questions relating to human rights. Most recently, Human Rights USA compiled and submitted

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[1] On May 1, 2004, this organization changed its name from the World Organization Against Torture USA. Human Rights USA did not receive any contribution or support for filing this brief from either of the parties nor from any other source, and no counsel for either party authored the brief in whole or in part. This brief is filed with the written consent of the parties, Petitioner's counsel of record, Lawrence S. Lustberg, and Jan Paul Miller, United States Attorney for the Central District of Illinois, Springfield Office Headquarters. These consent statements have been filed with the Clerk. Consistent with Supreme Court Rule 37.2(a), this brief is "submitted within the time allowed for filing a brief in opposition."

reports to the appropriate United Nations monitoring and enforcement agencies, on behalf of an informal working group of over 60 domestic civil rights and civil liberties organizations that Human Rights USA organized and chaired, on U.S. compliance under the Convention Against Torture (1998) and the International Convention on the Elimination of Racial Discrimination (2000), giving particular attention to such issues as the death penalty, prison conditions, police brutality, the status and treatment of refugees, and discrimination against people of color and indigenous peoples.

In addition, Human Rights USA has been involved in the litigation of many cases here in the United States, and in the courts of foreign nations. The group has filed amicus briefs in criminal cases applying these principles in Senegal, Belgium, Mexico, and the United States. The group also has filed four civil tort liability cases in U.S. courts based on the principle of universal jurisdiction embodied in the Alien Tort Claims Act and the Torture Victims Protection Act.

As experts in international law and human rights issues, and the application of international human rights standards in judicial proceedings in U.S. courts, Human Rights USA can provide valuable insight on a number of key issues raised by this case.

SUMMARY OF ARGUMENT

Amicus supports the Petitioner's position that both the Central District Court in Illinois and the U.S. Court of Appeals for the Seventh Circuit erred in holding that the federal court in South Carolina was the more suitable and only appropriate venue for habeas purposes. For a number of practical and legal reasons as set out below, the District Court in Illinois should be considered an appropriate forum for raising the substantial legal and constitutional issues that form the basis for the Petitioner's habeas claim. The availability of habeas relief in Illinois is made all the more necessary and

urgent by the fact that recent decisions by the federal District Court in South Carolina and by the U.S. Court of Appeals for the Fourth Circuit severely restrict habeas remedies in that Circuit in cases seeking to raise issues very similar to those posed by the Petitioner. These Fourth Circuit case precedents raise serious questions regarding the suitability and effectiveness of the judicial alternative suggested by the District Court in Illinois and the Seventh Circuit Court of Appeals regarding the filing of a habeas petition in this case in South Carolina. Indeed, the restrictions on the availability of an effective habeas remedy in South Carolina may have been part of the motivation of the U.S. government in transferring the Petitioner out of Illinois to that location.

Even in the absence of concerns regarding the availability of habeas relief in the jurisdiction where the Petitioner presently is being physically detained, substantial case precedent, including decisions by this Court, suggest that judicial authority to deal with habeas matters is not limited to one jurisdiction, but may be invoked in any jurisdiction where the government officials responsible for imposing significant restraints on liberty are located and can be properly served. This includes exercising habeas jurisdiction over supervisory officials such as the Attorney General or the President in addition to lower-level officials who are responsible for the custody and physical control of the Petitioner on a more immediate basis. This broader interpretation of habeas jurisdiction has been found by this Court and other courts to apply even in cases such as this involving the physical detention of prisoners.

These significant questions concerning the appropriateness of exercising habeas jurisdiction outside of the judicial district where the Petitioner is being physically detained, and the adequacy and availability to the Petitioner of habeas relief in the Fourth Circuit, together with the significant nature of the due process and other constitutional issues raised by the

treatment of the Petitioner, suggest that habeas jurisdiction over this case by the Central District Court of Illinois should not have been summarily rejected.

Moreover, the outcome and treatment of this case will not necessarily be governed by this Court's handling and treatment of related anti-terrorism cases currently before it, so that denial of certiorari in reliance on the resolution of those cases would not be an appropriate or effective means for resolving this case. The present case raises a number of issues of significant concern that are not addressed in other "anti-terrorism" and "enemy combatant" cases currently under review by this Court. This is the first case where a resident alien accused of terrorist acts had pending criminal charges in federal court dismissed so that he could be transferred to military jurisdiction and a military trial.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DOES NOT HAVE JURISDICTION TO HEAR THE PETITIONER'S HABEAS CLAIM

Under judicial precedent established by this Court, the Petitioner's physical detention in South Carolina does not change the fact that the Central District of Illinois retains jurisdiction for hearing his case and is empowered to exercise habeas jurisdiction over government officials whose actions in Illinois and elsewhere resulted in significant restraint on the Petitioner's liberty in violation of a number of legal and constitutional protections.

As this Court found in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494 (1973), the plain language of 28 U.S.C. § 2241, governing writs of habeas corpus, does not limit jurisdiction to the district in which the prisoner is detained. In *Braden* this Court rejected the U.S.

government's argument that a District Court's habeas jurisdiction was limited "to cases where the prisoner seeking relief is confined within its territorial jurisdiction." *Id.* This Court found that this approach "is fundamentally at odds with the purposes of the statutory scheme" authorizing habeas actions. *Id.* Justice Blackmun, in his concurring opinion, noted "that we have come a long way from the traditional notions of the Great Writ," and that there has been an "extraordinary expansion of the concept of habeas corpus" in recent years. *Id.* at 501.

Braden established that the appropriateness of habeas jurisdiction is determined by personal jurisdiction over the respondents and venue considerations rather than the situs of the prisoner's detention: "So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction.'" *Id.* at 495.

A. Commander Marr Is Not the Only Appropriate "Custodian" for Habeas Purposes

The Seventh Circuit erred in holding that only Commander Marr may be named the Respondent in Mr. al-Marri's habeas petition, *Al-Marri v. Rumsfeld*, 360 F.3d 707, 711-12 (7th Cir. 2004). Both this Court's decision in *Braden* and subsequent case law from a number of federal courts make clear that there is not one exclusive and proper venue for a habeas petition, nor one appropriate custodian that can serve as respondent for habeas purposes. Unlike typical habeas cases, Commander Marr as Mr. al-Marri's "immediate physical custodian" has no authority to release or transfer the Petitioner from his detention in South Carolina, nor is she responsible for the actions and policy determinations that placed the Petitioner in her custody and under military control despite his civilian status. Commander Marr, as a military officer, answers to her superiors, and in this case, only the President himself or Secretary Rumsfeld, acting as the Commander in Chief's representative, have the authority to release Mr. al-

Marri, and to rescind their order designating him an "enemy combatant," thereby making him subject to military rather than civilian jurisdiction.

As *Braden* recognized, the concept of habeas jurisdiction has broadened considerably to extend beyond the immediate physical custodian. *Armentero v. INS*, 340 F.3d 1058, 1064 (9th Cir. 2003). In *Armentero*, the United States Court of Appeals for the Ninth Circuit provided perhaps the most complete and detailed analysis of recent interpretations of jurisdictional issues arising under habeas proceedings, and most especially as to the determination of which official or officials "may properly be named as a respondent in a habeas action." *Id.* at 1061. The court in *Armentero* noted that this Court in *Braden* made it clear "that the custodian [for habeas purposes] need not be the person with immediate physical control over the detained prisoner while imprisoned." *Id.* at 1064. On the basis of their comprehensive analysis of *Braden*, and other case precedents, the court rejected "the INS' proposal that the appropriate respondent to. . . habeas actions is [limited to] the Bureau of Immigration and Customs Enforcement Interim District Direction for the regions in which a petitioner is detained," and indicated that the Attorney General and the Secretary of Homeland Security were appropriate habeas respondents, as the officials making the "controlling legal and policy determinations" that were being brought into question in the habeas proceeding. *Id.* at 1073.

The Seventh Circuit's rejection of habeas jurisdiction in this case may stem from the language in *Wales v. Whitney*, 114 U.S. 564, 574 (1885), where this Court indicated that: "All these [habeas] provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." However, in

many cases the person who has "immediate custody" of the detainee does not necessarily have the authority to deal with the underlying policy decisions or actions taken by higher-level officials that control the Petitioner's status, such as the Petitioner's designation as an "enemy combatant" in this case. *Wales* also predates the broader jurisdictional standards established by this Court in *Braden* which recognized that more than one government official, not just the Petitioner's immediate custodian, can be appropriate respondents in habeas proceedings. As the Ninth Circuit explained, "the concept of custodian is a broad one that includes *any* person empowered to end restraint of a habeas petitioner's liberty, *not just* the petitioner's on-site immediate physical custodian." *Armentero*, 340 F.3d at 1064 (emphasis added).

Since any government official who is ultimately responsible for the petitioner's detention may qualify as a proper respondent for habeas purposes, habeas jurisdiction can be established wherever such officials may be served and wherever venue is appropriate. This extensive case law precedent confirms that "there has never existed. . . an absolute requirement that a habeas action be brought [only] in the location of the 'immediate custodian.'" *Eisel v. Secretary of the Army*, 477 F.2d 1251, 1261 (D.C. Cir. 1973). In this case, the Illinois court has the jurisdiction to serve and exert judicial authority over Secretary Rumsfeld and President Bush through its long-arm statute.[2] Since Secretary Rumsfeld and President Bush are responsible for removing the Petitioner

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[2] The Illinois Long-Arm Statute, 735 ILCS § 5/2-209 (2003), states that "(a) any person, whether or not a citizen or resident of [Illinois], who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts: (1) The transaction of any business within this State; (2) The commission of a tortuous act within this State."

from the Illinois criminal process and transferring him to military jurisdiction in South Carolina by designating him an "enemy combatant," and their actions to effectuate these results were effected in Illinois, these Respondents are subject to personal jurisdiction in Illinois.

B. Traditional Venue Principles Allow the U.S. District Court for the Central District of Illinois to Exercise Habeas Jurisdiction Over the Petitioner's Claim

In *Braden*, this Court established that habeas jurisdiction may be exercised wherever a District Court can reach the respondent by service of process and wherever venue is proper. The location of a prisoner's physical detention amounts merely to one of several "traditional venue considerations" that must be considered. *Id.* at 493-94. This Court recognized that it is necessary to take into account a number of factors in addition to the physical presence of the detainee, including the location of "where all of the material events took place," and the location where "the record and witnesses pertinent to the petitioner's claim are likely to be found." *Id.* While the federal District Court in South Carolina certainly is one possible jurisdiction where the Petitioner's habeas claim can be brought, it is not the only or even the most appropriate judicial forum for this purpose.

Courts often face similar venue issues in deportation proceedings when the government arrests and places an alien into detention in one jurisdiction then transfers the alien to a facility in another jurisdiction where the alien had no prior significant contact. In several of these immigration cases, federal courts have placed limits on the Executive's ability to assign detainees to facilities where due process rights may be jeopardized as a result of the transfer. In such cases courts have granted habeas petitions even when the petitioner is detained outside the court's jurisdiction as long as, under the same traditional venue considerations set out in *Braden*, there

is an adequate basis for habeas jurisdiction over the respondent officials in the jurisdiction where the petition is being brought. *See Armentero*, 340 F.3d at 1069-70 (determining that a more "flexible approach" towards habeas jurisdiction is required to "better account for the reality of the frequently-changing and often far-flung locations in which [petitioners] are detained"). *See also, Singh v. Ashcroft*, 2003 WL 1873624 (E.D.N.Y. 2003); *Alcaide-Zelaya v. McElroy*, 2000 WL 1616981 (S.D.N.Y. 2000).

In *Alcaide Zelaya*, the court in that case recognized that a broader approach to the question of availability of habeas remedies was required in order to protect detainees who are subject to transfer at the whim of the government, because "it is, after all, the Government that directs where an [individual] is detained." *Id.* at *5. The court in *Alcaide-Zelaya* went on to reject the government's argument that the petitioner could only seek relief in the jurisdiction where the petitioner was being physically detained, because, as in the case at bar, the petitioner had no ties to the location of his detention, and there was evidence that the government's choice of detention facility was based, at least in part, as in the present case, on a desire to place the case in a jurisdiction where courts had favored the government's position on the habeas issues being presented.

In addition, as a practical matter, the Illinois court is the most reasonable and appropriate forum for exercising jurisdiction over Mr. al-Marri's habeas petition. The decisions below erroneously focus on the physical detention of the Petitioner in South Carolina as a basis for holding that South Carolina is the only appropriate venue despite the broader standards established by this Court in *Braden* for recognizing that jurisdictions other than where a petitioner is detained can provide the situs for habeas petitions. The decision to drop the criminal indictment against Mr. al-Marri in New York and to reinstate it in Illinois as a more appropriate venue also strongly indicates that the government, as well as the court

system, considered Illinois to be the proper venue for dealing with the Petitioner's alleged crimes.

Moreover, the government officials primarily responsible for the restraints on liberty that have been imposed on the Petitioner, and those in a position to end those restraints, are not his immediate custodian in the South Carolina prison, but those responsible for designating him as an "enemy combatant" and ordering him transferred to military jurisdiction. Commander Marr has no authority to alter those orders, further reducing the justification for limiting the situs for habeas jurisdiction to South Carolina.

In addition to all the above considerations, there are strong indications that the availability of effective or realistic habeas review has been severely restricted in the Fourth Circuit because they have ruled in cases involving factual and legal circumstances similar to those presented by the Petitioner that the Executive Branch will be given exceptional deference in anti-terrorism cases, and that habeas review is precluded in cases involving prisoners labeled as "enemy combatants," because that determination falls under the President's authority as Commander in Chief. The Fourth Circuit essentially ruled that it could not and would not review Executive Branch determinations of "enemy combatant" status when it dismissed habeas review in the *Hamdi* case by finding that "[t]he constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of his authority" in that capacity. *Hamdi v. Rumsfeld*, 316 F.3d 450, 474 (4th Cir. 2003).

There is no reason to believe that a different standard would be applied in the present case, or that the Fourth Circuit courts would consider or permit the type of habeas challenge in this case that they refused to allow in *Hamdi* regarding the President's sole discretion to make "enemy combatant" determinations. Consequently, the result of a

final dismissal of the Petitioner's habeas petition in the Seventh Circuit on jurisdictional grounds would mean that he would be denied habeas relief as a practical matter, and that the underlying legal and constitutional challenges that he seeks to raise would not be permitted to be addressed in any judicial forum. This Court and other federal courts have voiced great reluctance to allow situations where no judicial forum was available to consider claims of constitutional violations, since this would pose grave due process concerns.[3]

The ability of the President to unilaterally, and without revealing the reasons for his action, designate an individual as an "enemy combatant," and to transfer him on that basis to military control in a jurisdiction that restricts the availability of habeas review, denies that individual significant rights and protections established under the Constitution and undermines basic standards of justice, due process, and the rule of law. This Court has recognized that such basic due process rights cannot be revoked even in times of national emergency or war absent an official declaration of martial law. Yet the Executive defies these time-honored protections in this case, arguing that Mr. al-Marri does not have the

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[3] Amicus notes in this regard that at this stage of the present proceeding, if the Court believes that its disposition of the *Hamdi* and other anti-terrorism cases presently under review may affect the standards to be applied in the Petitioner's case, the most expeditious and perhaps the only way of accomplishing this result as a procedural matter would be for the Court to grant certiorari and to issue a ruling explaining how its decisions in the related cases should control or influence the outcome in this case. To deny certiorari under the assumption that the Supreme Court's rulings in related cases would somehow be applied (post-decision) to the Petitioner's case would be problematic, given the procedural posture of the present proceedings, and the previous definitive rulings that have been made by the courts below. The only way to assure that the standard this Court wishes to be applied to this case is carried out is for this Court to grant certiorari, so that (at a minimum) a per curiam decision can be issued even for this limited purpose, directing the courts below on the standard to be applied.

ability to challenge this action in a habeas proceeding in the jurisdiction where he resides and has the most substantial contact. The Executive Branch should not be permitted to deny habeas venue in Illinois when the result will be to foreclose habeas review and a meaningful consideration of his constitutional claims in any jurisdiction. At a minimum, under the *Braden* standards, there is sufficient basis for finding the Central District of Illinois to be a proper venue for Mr. al-Marri's habeas petition.

II. THE SEVENTH CIRCUIT'S DECISION PRECLUDES EFFECTIVE HABEAS REVIEW IN THIS CASE AND RESULTS IN SUBSTANTIAL AND SIGNIFICANT VIOLATIONS OF LEGAL AND CONSTITUTIONAL STANDARDS, AS WELL AS PRINCIPLES OF INTERNATIONAL LAW

As indicated above, it is Amicus' position that the dismissal of Petitioner's habeas claim in the Seventh Circuit results, as a practical and legal matter, because of the restrictions placed on habeas actions in cases of this type by the Fourth Circuit, in the elimination of his constitutionally-based habeas rights to challenge unlawful and unconstitutional actions that have produced significant restraints on his liberty. While the petition for certiorari in this proceeding is necessarily focused on the jurisdictional and venue issues that produced the dismissal of this case in the proceedings below, Amicus believes that it nevertheless is important even at this preliminary stage to remain aware of the nature and importance of the underlying legal and constitutional issues that are posed by this case. This brief overview of the substantive framework will help to inform the Court's consideration of the jurisdictional issues because it explains the significance and urgency of the types of legal violations taking place that the Petitioner's habeas action is seeking to prevent. The substantive framework of the case indicates

why a denial of an effective habeas remedy on jurisdictional grounds poses the most serious constitutional questions.

A. As a Resident of the United States, the Petitioner Is Entitled to Constitutional Due Process Protections

The necessary starting point for any analysis of the substantive violations faced by the Petitioner must be the recognition that the Petitioner, as a lawful resident alien with substantial ties to the United States, is subject to legal and constitutional protections. Since the 19th century, this Court has held that aliens present on United States soil are entitled to certain constitutional protections. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (extending protections of the Fifth and Sixth Amendments to resident aliens); *Plyler v. Doe*, 457 U.S. 202 (1982) (applying the Fourteenth Amendment to resident illegal aliens). This Court has repeatedly held in immigration law cases that a major distinction has to be drawn between aliens who are already present within the United States (even if they do not have legal status) and those who were stopped at the border and are not considered to have entered the country. *See Zadyvas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990). Once aliens enter the country and develop significant connections with the United States, especially if their status is as legal residents, they are entitled to constitutional protections. *Verdugo-Urquidez*, 494 U.S. at 271.

Mr. al-Marri entered this country legally and has lived in and developed significant connections with the United States over a number of years. He was a resident of Illinois as a four-year student at Bradley University while obtaining his bachelor's degree, and he again became a resident of Illinois when he returned to Bradley University in September of 2001 in order to obtain a master's degree. As a legal resident of the

United States, Mr. al-Marri must be considered protected by due process and other constitutional protections.

B. As a Civilian Resident Alien, the Petitioner Should Not Be Subjected to Military Jurisdiction

The first legal and constitutional problem raised by the treatment of the Petitioner is that the government is seeking to characterize his alleged crimes as related to military action, and on that basis to subject him to military jurisdiction. Only in rare instances have civilians of the United States ever been subjected to military jurisdiction, and the Petitioner's case does not fall within any of those exceptions to the general rule prohibiting the exercise of military jurisdiction over United States civilians. In *Rumsfeld v. Padilla*, 352 F.3d 695 (2nd Cir. 2003), *cert. granted*, 72 U.S.L.W. 3533 (U.S. Feb. 20, 2004) (No. 03-1027), the government argued that *Ex Parte Quirin*, 317 U.S. 1 (1942), allows the military to detain alleged terrorist civilians as "enemy combatants" when such "[c]itizens . . . associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, [as] enemy belligerents within the meaning of the law of war." Brief for Petitioner at 6, Padilla (No. 03-1027). Such reasoning cannot justify Mr. al-Marri's detention because the facts of *Quirin* differ substantially from the Petitioner's case. The defendant in *Quirin* entered the United States illegally, as a secret German agent and saboteur, when the United States was engaged in a formally declared war with Germany. He abandoned his clothing identifying him as a German soldier for the sole purpose of enabling him to commit sabotage. *Quirin*, 317 U.S. at 1. In contrast, Mr. al-Marri entered the country legally, with his family, for the purpose of obtaining a degree at a university where he had already obtained his bachelor's degree. He is not a member of any nation's armed forces, let alone a nation against which the United States has

declared war. In addition, the charges originally filed against him of credit card fraud and lying to the FBI do not rise to the level of sabotage.

Another exception to the prohibition against military prosecution of U.S. citizens or residents applies to those involved in actual combat during a time of war. In *Reid v. Covert*, 354 U.S. 1, 33 (1957), this Court recognized that "the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules," but as a general rule civilians are not subject to military jurisdiction, especially when they are not invovled in warfare. The arrest of Mr. al-Marri on United States soil when he was not participating in armed combat in a theater of war can not qualify as such an instance. Mr. al-Marri was not engaged in "actual fighting" nor was he in an "area" where armed conflict was taking place.

C. The Petitioner Does Not Qualify as an Enemy Combatant and Should Have Access to the District Court for the Central District of Illinois to Challenge This Designation

The Executive Branch seeks to deny the Petitioner his constitutional protections on the basis of designating him an unlawful "enemy combatant" based on alleged terrorist ties. The government seeks to remove him from the regular civilian judicial process and place him under military jurisdiction on that basis. The designation of the Petitioner as an "enemy combatant" and his indefinite detention under military jurisdiction on that basis violates due process protections as well as international law because Mr. al-Marri does not qualify as an "enemy combatant" as defined by international law, nor has he been adjudged to meet that criteria by a competent tribunal as required by law.

The "enemy combatant" designation exists as an exception to the general rules governing treatment of prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter "GPW"]. An illegal "enemy combatant" under the Geneva Conventions is a person who has "committed a belligerent act" in the context of a war but who does not meet the qualifications of a prisoner of war. *Id.* at art. 5. Such individuals do not enjoy the same protections as prisoners of war. The government's effort to stretch the meaning and intent of the "enemy combatant" provisions of the Geneva Conventions to cover civilians in the United States not engaged in what constitutes internationally recognized armed conflict violates international law and accepted interpretation of the Geneva Convention requirements.

Specifically, Mr. al-Marri does not qualify as an "enemy combatant" because he was not captured in the context of a declared war with another government, nor was he engaged in an internal armed conflict covered by Geneva Convention standards. Rather, he was arrested inside the United States for acts that may (if proved) constitute crimes but do not constitute acts of war as they are defined under the Geneva Conventions. The "enemy combatant" designation does not apply to the type of alleged criminals acts that the Petitioner is accused of having committed. Private criminal acts, even if such acts are violent in nature and international in scope, do not constitute acts of war or come under the Geneva Convention standards.

It is true that Geneva Convention standards have been expanded to cover a wider range of conflicts, including "internal" armed conflicts taking place within one nation. *See* Geneva Convention I, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 3 (also known as Common Article Three); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; GPW, *supra*;

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol I, 1125 U.N.T.S. 3; Protocol II, 1125 U.N.T.S. 609. The recognition that internal armed conflicts could qualify as theaters of war for Geneva Convention purposes, based on the armed actions by insurgents, expanded the scope of actions subject to Geneva Convention standards.

But it is doubtful that even this broadened definition of armed conflict covers the type of terrorist activities that the U.S. government is citing as a basis for applying the "enemy combatant" exception to prisoner of war status. In international law, insurgent groups are not parties to international agreements, but they are required to adhere to the laws of war. Insurgent groups are defined by the following characteristics: the insurgent group must have the semblance of a government; an organized military force; control of significant portions of territory of their own; and their own relatively stable population or base of support within a broader population. Jordan Paust, *There is No Need to Revise the Laws of War in Light of September 11th*, Am. Soc'y of Int'l L. Task Force on Terrorism Rep. (November 2002); Jordan L. Paust et al., *International Criminal Law* 809, 812-32 (2d ed. 2000). A transnational terrorist or criminal network, such as Al Qaeda, has none of the hallmarks of a rebel insurgent group for Geneva Convention purposes. They have no clearly delineated geographic territory, and "Al Qaeda neither aspires to the creation of a separatist state nor seeks to seize political authority throughout the territory of an existing state." Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303, 312 (2002). Declaring a state of war against a transnational terrorist or criminal network suggests that wartime powers can be exercised in any crime-control situation that extends across national borders (the war against drugs, for example), and that core constitutional protections can be restricted or eliminated simply by labeling any type of threat as

constituting a state of war and by designating the criminal suspects as "enemy combatants."

In short, the legal validity of the U.S. government's efforts to deal with alleged terrorists as unlawful "enemy combatants" subject to military jurisdiction rests on the question of whether these individuals (other than those captured in actual war zones) can be considered prisoners of war and subject to Geneva Convention standards in the first place, and that has not been adequately established in the Petitioner's case.

The effort by the government to designate the Petitioner as an unlawful "enemy combatant" and to deny him his legal and constitutional protections on that basis violates international legal standards in another important respect. The GPW stipulates that:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy [should be classified as prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW, *supra*, art. 5. Use of the "enemy combatant" status has been rare and can only be determined by a "competent tribunal." As treaties that have been ratified by the United States, these Geneva Convention standards have become part of "the supreme law of the land," and have been scrupulously adhered to by the United States since 1949. U.S. Const. art. VI. *See also* Brief of Amici Curiae Experts on the Law of War in Support of Petitioners, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3446 (U.S. Jan. 9, 2004) (No. 03-6696).

The standards established by the Geneva Conventions also have been adopted and implemented by the Code of Military Justice and a number of implementing rules and regulations adopted by the armed forces of the United States. These

military codes and standards expressly acknowledge the GPW principles, including Article 5:

> In accordance with Article 5. . . if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories [of prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997) *available at* http://www.adp.army.mil/pdffiles/r190_8.pdf. These regulations have been strictly observed by U.S. military forces in past wars. For instance, during the first Gulf War, the military held 1,196 tribunals to determine the status of individuals being detained. Three hundred ten of those individuals gained prisoner of war status, while the tribunals determined that the remaining 886 were "displaced civilians." None were determined to be "enemy combatants." Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* app. L at 578 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf.

The reason for the care that military authorities have demonstrated in enforcing the Geneva Convention standards in general, and the "competent tribunal" requirement for "enemy combatants" in particular, is clear. Strict enforcement of these requirements is the best means for insuring that our own military personnel, if captured during wartime, will be treated humanely and appropriately according to Geneva Convention standards, and not arbitrarily deprived of their rights, as the U.S. government is seeking to do with the Petitioner. In the Petitioner's case, no "competent tribunal" has approved of his designation as an "enemy combatant" as required by the Geneva Conventions. The Executive Branch imposed this designation in violation of international law since it did not follow standard procedures for determining

the Petitioner's status, establishing his participation in an armed conflict, and assessing whether his alleged actions were "unlawful" under Geneva Convention standards.

Since there is no legal basis for the government's effort to treat the Petitioner as an unlawful "enemy combatant" subject to military authority, he must be treated as a civilian, with any criminal charges brought against him handled in regular criminal court where his due process and other constitutional protections can be fully observed.

CONCLUSION

Based on the overly narrow interpretation applied by the U.S. District Court for the Central District of Illinois and the U.S. Court of Appeals for the Seventh Circuit to the jurisdictional standards applicable to habeas proceedings (as set out by this Court in its *Braden* decision), given the practical reality that the courts in the Fourth Circuit do not provide an adequate alternative forum for the Petitioner to pursue habeas relief, and taking into account the significant nature of the underlying legal and constitutional challenges that the Petitioner is seeking to raise, Mr. al-Marri's petition for certiorari should be granted and the merits of his appeal considered by this Court.

Respectfully Submitted,

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